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No. 84-1714

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOHN H. SLINGERLAND,
Appellant,

--vs.--

PAUL N. OLSON, as Chairman of the Vermont Board of Bar Examiners, THE VERMONT BOARD OF BAR EXAMINERS, and THE VERMONT SUPREME COURT,
Appellees.

On Appeal from the Vermont Supreme Court

MOTION TO DISMISS

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MOTION TO DISMISS FOR FAILURE TO ST
A SUBSTANTIAL CONSTITUTIONAL QUESTI

Appellees respectfully pray
this Honorable Court dismiss this a
because it fails to state reasons
the questions presented are
substantial as to require pl
consideration for their resolu
(Supreme Court Rule 15.1 (h))

I. THE STATE STATUTE INVOLVED AND T
NATURE OF THE CASE

A. The Statute

This appeal raises the questi
the validity of the Rules of Admi
of the Vermont Supreme Court (Ve
Statutes Annotated, Title 12, Ap
Pt.II, 1982). These rules provid
criteria to be used in grading an
examination and they establish
process of review for unsucce

applicants.

B. The Proceedings Below

Appellant sat for the July, 1 bar examination and, on or about Octo 3, 1984, received notification that failed the essay portion of the exami tion. After receiving notificati Appellant appealed to the Chairman the Board of Bar Examiners pursuant Vermont Statutes Annotated Title App. I, Pt. II §10(g)(Supp. 1984 In accordance with Section 10(g Appellant was provided with a copy his essay examination answers; a copy the model answer; a grading guide an typical best answer for each quest and verification of arithme computation for the essay examina and of grades reported.

On November 14, 1984, the Chai notified the Appellant that his peti

and his original answer bookl
been reviewed. Finding that th
been no misconduct on the part
examiner or the Board; the
therefore, could find no sub
merit to appellant's appeal.

Appellant next sought revie
Vermont Supreme Court by filing
tion for extraordinary relief
Statutes Annotated, Title 12,
Pt.II, §14(b) (Supp. 1984);
Rules of Appellate Procedur
21).[3] On February 5, 198
Vermont Supreme Court deni
petition since the Chairman of t
of Bar Examiners had fo
substantial merit to the c
examiner misconduct.[4]

II. ARGUMENT

The Case Presents No Substantial Co tutional Question

Appellant raises essentiall questions before this Court. Fir asserts that the Vermont Supreme refused to rule on the constitu validity of their rules and that refusal is ipso facto a denial process. Second, he makes a bold allegation that the lack of a J relating to grading errors[5] denial of due process, even Vermont affords an unlimited right examination.[6]

1. THE RULES OF THE VERMONT S COURT WHICH LIMIT THE SCOPE OF REV ISSUES OF MISCONDUCT, BUT PROVI UNLIMITED RE-EXAMINATION, DO CONTRAVENE THE REQUIREMENTS O PROCESS.

This Court has never consider question whether due process r

the type of review sought by
but several circuit courts hav
circuit courts have held
process is satisfied
unsuccessful applicant is give
to re-take the bar examinat
though no review process is
Tyler v. Vickery, 517 F.2d 1
4 (5th Cir. 1975) cert. de
U.S. 940 (1976); Brewer v.
691 F.2d 216 (5th Cir. 1982)
Board of Commissioners, 737
(11th Cir. 1984); Younger v
State Board of Law Examiners
372 (10th Cir. 1980); Poats
651 F.2d 495 (7th Cir. 1981).

A bar admission essay
by its nature does not lend
either full-blown or
confrontational hearings.
that arise in the review

examinations involve judgment and discretion, e.g. writing style, knowledge of the law and the capacity to analyze factual situations and apply principles of law. See generally, Hoover v. Ronwin , 52 U.S.L.W. 4535, 4541, n.31 (U.S., May 14, 1984). Viewed in light of Mathews v. Eldridge , 424 U.S. 319 (1976), no hearing would be required to review essay examinations, if there exists an unlimited right to retake the bar examination.

> '[D]ue process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. (cite omitted) [D]ue process is flexible and calls for such procedural protections as the particular situation demands. (cite omitted) Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. (cites omitted) More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of

> three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (cite omitted)

Id at 902-903.

Balancing the interest involved, under the three pronged Mathews test, reveal that Vermont's unlimited right to re-examination weighs significantly in Appellee's favor, especially since Vermont offers bar examinations every six months. If a hearing were to be afforded: 1) the applicant's interest would not be advanced because of the time factors involved; 2) the risk of erroneous decision making would not be lessened; and 3) the additional

administrative and financial burden on the Vermont Supreme Court would be inordinate.[7]

Procedural due process should not require governments or individuals to participate in exercises that benefit neither party. Form should never prevail over substance. Vermont's system of unlimited re-examination every six months operates in everyone's best interest. Given the interest involved, the quantum of process that is due an unsuccessful applicant is amply provided for by the rules of admission of the Vermont Supreme Court. No substantial federal question has been raised by the denial of review for grading errors.

2. THE RECORD IN THIS CASE INDICATES THAT THERE ARE NO FACTS TO SUBSTANTIATE A CONCLUSION THAT THIS PARTICULAR APPLICANT DID NOT RECEIVE ALL OF THE PROCESS THAT WAS CONSTITUTIONALLY DUE.

Appellant seeks to have this Court rule as a matter of law that refusal by the Vermont Supreme Court to regrade and substitute its judgment for that of the Board of Bar Examiners is a violation of due process.

It is ironic that Appellant places significant reliance on Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), (Frankfurter, J., concurring) Schware stands for the proposition that this Court will exercise extreme caution in reviewing individual admission decisions:

> It is beyond this Court's function to act as overseer of a particular result of the procedure established by a particular State for admission to its bar.... Especially in this realm it is not our business to substitute our judgment for the State's judgment--for it is the STATE in all the

> panoply of its powers that is under review when the action of its Supreme Court is under review.

Id. at 248

The requisite level of specificity that would mandate review in an individual bar admission case is not present. The type of review necessary to make an informed decision given the facts presented by Appellant would constitute an unwarranted intrusion into the province of the Vermont Supreme Court for, "[A]dmission to practice in a state and before its courts necessarily belongs to that State." Schware, supra, 353 U.S. at 248 (Frankfurter, J., concurring).

In order to conclude that a substantial federal question exists, this Court would have to substitute its judgment for that of the Vermont Supreme Court and find that some arbitrary,

capricious, discriminatory unreasonable conduct[8] occurred.

Zucht v. King , 260 U.S. 176-177 (1922) read in conjunction Charleston Association v. Alderso 324 U.S. 182, 187 (1945) require this appeal must both raise substantial question and explic attack the statute under considerati

The statute under consideration the Rules of Admission to the Bar of Vermont Supreme Court. Section 5 of those rules provides:

> Applicants for admission demonstrate the min professional competence neces to engage in the practice of including but not limited to: knowledge of the statutory common law, (2) capacity to ana factual situations and a principles of law to them, and facility for written expression.

Appellant, in order to show existence of a substantial fed

question, must: (1) demonstrate tha grading discrepancies exist in light o the standards of Section 5; and (2) sho that the Vermont Supreme Court, wit notice of these allegations, faile either to entertain these questions o to render a decision based on th record. No showing of this type ha been made by Appellant in any stage o this case.

All that Appellant has done ha been to tally the number of issue raised in his essay examination an compare it with the number of issue raised in the model answers. This woul probably suffice if the examination wer simply an exercise in "issue spotting" On the information presented Appellant, this Court can only specula as to which of the critera in Secti 5(b) that Appellant was found to

deficient. Appellant's conclusory of "serious grading discrepancies never been substantiated particularity. He merely analyze of several grading criteria. Ther innumerable other adequate reason he could have failed the examination, despite the numbe issues he raised, eg., lack of kno of the statutory or common la inability to analyze factual situ and apply the law to them; o inability to write well. These a addressed.

The speculative nature Appellant's assertions would r this Court to review or regrad essay examination. This Court not have to undertake a task of magnitude on behalf of Appellant.

Full review is available in V

when misconduct is shown.[10] Otherwise, in grading cases, what each unsuccessful applicant would want "to do is challenge the conclusion of a particular grader that the written response to a particular essay question was inadequate". Lucero v. Ogden, 718 F.2d 355, 358 (10th Cir. 1983). The Vermont Supreme Court would either be required to regrade each failing examination or perform the onerous task of reviewing for fairness every six months[11] the grading process See, eg Cupples v. Marzall, 101 F.Supp. 57 (D.C. 1952).

Schware created a rebuttable presumption that the process of review for bar admission is fair and unbiased. Jurisdiction was granted in Schware because the presumption was rebutted when it was shown that the New Mexico

Supreme Court had abused
discretion. The New Mexico Su
Court acted contrary to the
contained in the record when it
"the petitioner the opportunit
qualify for the practice of law"
at 247. This Court stated that:

> The State contends that
> though the use of aliases
> arrest, and the membership i
> Communist Party would not j
> exclusion of petitioner fro
> New Mexico bar if each stood
> when all these are combine
> exclusion was not unwarranted
> cannot accept this contention
> light of petitioner's fo
> showing of good moral char
> the evidence upon which the
> relies--the arrests for of
> for which petitioner was n
> tried nor convicted, the use
> assumed name many years ago
> membership in the Communist
> during the 1930's--cannot be
> to raise substantial doubts
> his present good moral char
> There is no evidence in the
> which rationally justifie
> finding that Schware was m
> unfit to practice law.

Id. at 246-247.

Appellant was provided wi

opportunity to demonstrate to
Vermont Supreme Court that the grad
of his examination was arbitra
capricious, discriminatory
unreasonable. Appellant was given
opportunity to compare his performa
with the model answers, to ra
questions of fairness, and to m
explicit legal arguments regarding
method of evaluation before the Chair
of the Board of Bar Examiners and
Vermont Supreme Court. This Court
"not ... concerned with the grou
which justify denial of a license
practice law, but only with
procedural due process requires if
license is to be withheld." Willner
Committee On Character, 373 U.S.
103 (1962).

Appellant has failed to show
either the review afforded to him by

Vermont Supreme Court was not me
or that serious grading discr
exist. The scope of his revie
the Vermont Supreme Court was pr
upon his ability to demonstrate
grading discrepancies. The ge
his problem lies in his fai
recognize that Vermont's bar exa
is comprised of more criter
"issue spotting". This problem
magnified when Appellant atte
state his case as invol
substantial federal question. T
necessary to support the conclus
a substantial federal quest
present do not exist.

CONCLUSION

Due process is one of the complex areas of the law. It flexible concept with multifa aspects that are directly proport to the differing factual settings give rise to its discussion. through clarity of thought and allegiance to the interest protected can the decisions of Court have precedential value applied to this case.

Appellant complains about quantum of process that he received he requested review of his examination and when he soug declaration that Vermont's rule review for unsuccessful cand constitute a *per se* violation c process. In *Schware v. Board o Examiners*, 353 U.S. 232 (1957

Willner v. Committee on Chara
U.S. 96 (1963), the cases rel
Appellant, the interest soug
protected did not involve the
the process afforded. Rat
challenges attacked the s
application of the rules or t
that occurred in implemen
rules.

The amount of process nec
protect those interest
quantitatively different f
present case. Appellant her
the rules, not the process
under them. Moreover, the ver
Appellant asserts here, protec
arbitrary, capricious, discrim
unreasonable decision-makin
adequately protected under the
admission of the Vermont Suprem

No substantial federal que

been raised by the Appellant. This matter should be dismissed.

Respectfully submitted,

STATE OF VERMONT
Jeffrey L. Amestoy
Attorney General

By:

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Assistant Attorney General
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Attorney for Appellees

[1] Vermont Statutes Annotated, Title 12, App. I, Pt. II §10(e),(f) and (g) (Supp. 1984) provide:

> (e) The decision of the Board as to which applicants pass and which applicants fail an examination shall be final, except upon showing of misconduct on the part of one or more members of the Board.
>
> (f) An applicant who takes and fails to pass the essay or Multistate Bar Examination part of the bar examination may petition for review by the Board. The petition must be made in writing to the Clerk of the Supreme Court within thirty days of mailing of the examination results. The Board need not explain the grade received but shall provide review as follows:
>
> 1) a photocopy of the applicant's essay examination answers;
>
> 2) a copy of a model answer, a grading guide and a typical best answer for each question;
>
> 3) handscoring by Educational Testing Service of the Multistate Bar Examination;
>
> 4) verification of arithmetic computations for the essay examination; and
>
> 5) verification of grades reported.

(g) Within fourteen days of mailing the review results provided for in §10(f), an applicant may appeal to the Chairman. The appeal shall be in the form of a written petition which shall set forth specifically and in detail any claim of misconduct by an examiner or the Board. The Chairman shall render a ruling in writing within thirty days of receipt of the petition as to whether the appeal has substantial merit. If the Chairman finds substantial merit to the appeal, it shall be referred forthwith to the full Board, less any examiner whose conduct is the subject of the appeal. If the Chairman finds no substantial merit to the appeal, the Chairman shall inform the applicant in writing of the decision, which shall be final.

2 See footnote 1.

3 Vermont Statutes Annotated, Title 12, App.I, Pt.II, §14(b) (Supp. 1984) provides:

> Except as otherwise provided by these Rules any individual may appeal from a decision of the Board of Bar Examiners by filing an action with the Vermont Supreme Court as a matter of original jurisdiction pursuant to the Rules of Appellate Procedure.

4 See appellant's jurisdictional statement Appendix B.

5 The rules for admission to practice do not specifically deny an applicant

the right to review based on grading errors. It does restrict review to instances of misconduct by an examiner. If the grading error is the product of misconduct, it is reviewable. The burden lies with the applicant to show such misconduct.

6 The rules of admission set no limits on the number of times an unsuccessful applicant may take the exam. The former rules did have restrictions (See former Rule 4, §5, Vermont Statutes Annotated, Title 12, App.I, Pt.II), but these were replaced on September 17, 1982, (Vermont Statutes Annotated, Title 12, App.I, Pt.II) and these former rules are inapplicable to the present case.

7 See , Tyler v. Vickery , 517 F.2d 1089, 1104-1105 (5th Cir. 1975).

8 See , Whitfield v. Illinois Board of Law Examiners , 504 F.2d 474, n.7 (7 Cir. 1974.

9 Vermont Statutes Annotated, Title 12, App.I, Pt.II, §5.

10 Vermont Statutes Annotated, Title 12, App.I, Pt.II, §10(e).

11 The bar examination is given every six months. Vermont Statutes Annotated, Title 12, App.I, Pt.II §10(c).

PROOF OF SERVICE

I, Samuel E. Johnson, Assistant Attorney General, appearing as counsel for appellees herein, depose and say that on the 30th day of May, 1985, I served 40 copies of the foregoing Motion to Dismiss properly addressed to the Clerk of this Court and three copies on the following parties by depositing the same in the United States post office, First Class postage prepaid to:

William E. Mikell, Esq.
P.O. Box 587
Burlington, Vermont 05402

Date: May 30, 1985

Samuel E. Johnson
Asst. Atty. General

Subscribed and sworn to before me this 30th day of May, 1985.

NOTARY PUBLIC
My commission expires
February 10, 1987